No. 05-1353

Supreme Court, U.S.
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In The Supreme Court of the United States

ROBERT BENSON and
JUDITH BENSON,

Petitioners,

v.

STATE OF SOUTH DAKOTA; M. MICHAEL ROUNDS, in his official capacity as Governor of the State of South Dakota; LARRY LONG, in his official capacity as Attorney General of the State of South Dakota; SOUTH DAKOTA DEPARTMENT OF GAME, FISH, AND PARKS; and JOHN COOPER, in his official capacity as Secretary of the South Dakota Department of Game, Fish and Parks,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of South Dakota

PETITIONERS' REPLY BRIEF

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INTRODUCTION

The State of South Dakota mischaracterizes this case as one concerning the constitutional implications of a decriminalization statute, Respondents' Brief in Opposition ("Resp. Br.") at 10, and, as such, argues that this Court should not substitute its judgment for that of the South Dakota Supreme Court.

The factual background does not, however, support these contentions, which ignore the State's comprehensive regulatory system controlling every aspect of hunting. No other conclusion may be gained from a plain reading of the statute, which provides, in relevant part, that lawful "hunting on highways or other public rights-of-way includes . . . [t]he shooting at or taking by legal methods of small game, except morning dove, that are in flight *over private land* if the small game has either originated from or has taken flight from the highway or public right-of-way or if the small game is in the process of flying over the highway or public right-of-way." SDCL § 41-9-1.1(2) (emphasis added).

ARGUMENT

I. THIS COURT SHOULD GRANT *CERTIORARI* WHERE THE CLEAR MEANING OF A STATE STATUTE IS IGNORED BY THAT STATE'S HIGHEST COURT AND THIS COURT'S TAKING PRECEDENT IS MISAPPLIED.

South Dakota contends that, where the plain meaning of a statute is clear, certain, and unambiguous, the interpretation of that statute may not be addressed by this Court. To the extent the language of the statute is clear,

certain, and unambiguous, its meaning is inapposite to that given it by three of the five justices of the South Dakota Supreme Court. In fact, the trial court, two of the five South Dakota Supreme Court Justices, the administrative agency, South Dakota's legislature, and even the Office of the South Dakota Attorney General (prior to this legal challenge) each came to the conclusion that the plain meaning of the statute was not one of decriminalization but rather an alteration of South Dakota's comprehensive regulatory hunting scheme to make fully lawful the act of shooting over private property.

South Dakota, in arguing that this Court may not hear this case, asserts that "[t]he interpretation of South Dakota law did not change at any time after passage of the statute." Resp. Br. at 1. This is quite simply not true. The same Attorney General's office that, upon the instant challenge of this State law, asserted "mere decriminalization" as one of its twenty-two affirmative defenses, had summarized, upon passage, the very same legislation as allowing "a hunter to shoot over private property if the bird flushed within the public right of way." Petitioners' Appendix ("App.") at 165.

Similarly, the South Dakota Department of Game, Fish and Parks, the state agency tasked with implementing the statute, published the State's official hunting manual (described therein as a "synopsis of South Dakota Codified Laws and Game, Fish and Park rules."; App. at 110) wherein the agency informed hunters that they could now shoot lawfully over and onto private property.

Even the legislative debate consisted almost entirely of whether the State's tradition of road hunting should trump a citizen's right to exclude hunters from private

property and contained no mention whatsoever of decriminalization. In fact, the legislature included a provision in the statute that nullified the statute's amendment in the event the South Dakota Supreme Court held shooting over private property to be a taking. That provision makes no sense if the "clear" meaning of the statute is what three South Dakota Supreme Court Justices so conveniently found it to be.

The statute may be clearly understood as interpreted by the legislature, by the Attorney General's summary of the legislation, and by the expert state agency responsible for implementing the statute. That clear meaning was ignored, however, by South Dakota's highest court and in so doing that court misapplied this Court's taking precedent.

II. THE SOUTH DAKOTA SUPREME COURT MISAPPLIED THIS COURT'S PRECEDENT AND THUS A TAKING OCCURRED, AT A MINIMUM, BETWEEN PASSAGE OF THE STATUTE IN QUESTION AND THE STATE SUPREME COURT'S DECISION.

In its Brief in Opposition, South Dakota mistakenly contends that Petitioners rely on "the proposition that a plainly worded statute meant something else when it was passed than when it was interpreted by the South Dakota Supreme Court." Resp. Br. at 16. In actuality, however, it was the Attorney General's Office that, upon passage, summarized the legislation as making lawful the shooting onto private property and that, upon legal challenge, changed its interpretation.

South Dakota also contends that "no case law supports" Petitioners' "novel argument" that a taking occurred between passage of the legislation and the time at which the South Dakota Supreme Court issued its decision. South Dakota is incorrect in both assertions.

South Dakota makes these assertions as though the statute in question was passed, interpreted, implemented, and thereafter remained in a vacuum for nearly three years until the South Dakota Supreme Court issued its opinion. No such vacuum existed. Rather, for nearly three years, hunters' potentially fatal projectiles crossed Petitioners' private property. In early affidavits, Petitioners swore that the number of projectiles upon their properties increased significantly as a result of the State's actions regarding HB 1173. To these facts, South Dakota stipulated.

Not one legislator in the entire contentious debate regarding the statute in question ever hinted, let alone argued, that the statute was in any way a "mere decriminalization" statute. App. at 115-64. Moreover, after passage, State attorneys and administrative officials, through publications, made it quite clear that shooting over private property was lawful when done from within public rights-of-way.

As to South Dakota's assertion that "no case law exists" to support Petitioners' "novel" argument that a taking occurred between the passage and implementation of the statute and the time the South Dakota Supreme Court issued its opinion, South Dakota is again in error.

Petitioners could, for example, rely almost exclusively on *Loretto* in support of their claim. "[W]here governmental action *results* in "a permanent physical occupation" of

the property, by the government itself *or by others*, [the United States Supreme Court] uniformly ha[s] found a taking." *Loretto v. Manhattan CATV Corp.*, 458 U.S. 419, 432-35 (1982).

Projectiles rained upon Petitioners' property as a direct result of actions by South Dakota government officials. The legislation itself, subsequent declarations by state officials, and official publications by the State encouraged hunters to shoot onto private property from public rights-of-way. To escape liability, South Dakota now seemingly denies that its legislature, Attorney General's office, and Department of Game, Fish and Parks are government actors or that the actions of these government employees constitute the "government action" addressed by this Court in *Loretto*.

III. SOUTH DAKOTA ERRS IN SUPPOSING THAT AN AFTER-THE-FACT CIVIL REMEDY IS EQUALLY PROTECTIVE OF PETITIONERS' RIGHT TO EXCLUDE AS IS A CRIMINAL REMEDY.

South Dakota argues that it is "obvious" that after-the-fact civil remedies are equally protective of Petitioners' right to exclude. Resp. Br. at 18. This is not the case.

Where a State assumes its proper role of protecting individual rights against initiations of force by others, a call to the local law enforcement agency would, in theory, evoke a response to the scene at which time a law enforcement officer could compel, by force if necessary, the shooter to discontinue the firing of his weapon onto another's private property. Under the law in question, according to South Dakota's own pleadings, Petitioners no longer have this right because "state and local law

enforcement will no longer act to prevent or curtail such activity." *Benson v. State of South Dakota*, Civ. 03-121 (6th Jud. Cir. Dec. 17, 2004). App. at 95-96.

Unless South Dakota means to suggest that a property owner must now assume responsibility for law enforcement and confront the armed shooter, make a citizen's arrest (where no criminality is said now to exist), and force the shooter to discontinue firing his weapon, there is a significant difference in the property owner's right to exclude as compared to a situation where local law enforcement officials may be summoned. Of course, even if a property owner assumes the role of hunter patrol, he would still be less effective insofar as he would not command the perceived legitimacy of that enjoyed by government-sanctioned law enforcement officials.

Unfortunately, one example of how such a private-to-private confrontation may play out was witnessed recently in nearby Wisconsin. The tragic results of these citizens taking property enforcement matters into their own hands resulted in the slaying of five persons and the serious injury of several others.[1] Two members of the South Dakota Supreme Court and the trial court held that such a vigilante-friendly interpretation of the statute in question "makes no sense." *Benson*, Civ. 03-121 (6th Jud. Cir. Dec. 17, 2004). App. at 97-98.

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[1] "Sheriff's deputies are investigating the killings of five hunters Sunday in northwest Wisconsin – bloodshed apparently sparked by a dispute over a hunting spot. A suspect has been arrested." "This is completely nuts," said Chief Deputy Tim Zeigle of the Sawyer County Sheriff's Department. "Why? I mean, five people dead because somebody was trespassing on property. It makes no sense." CNN.com, *Five hunters killed in Wisconsin woods*, http://www.cnn.com/2004/US/11/22/hunters.slain/ (last viewed June 4, 2006).

Only if South Dakota assumes that each hunter fires only one shot and then immediately moves on to shoot on some other private property does the State's notion that both after-the-fact civil remedies and criminal remedies are equally effective hold true. Absent some opportunity to enlist the aid of a law enforcement officer to force the shooter to discontinue the firing of additional projectiles over and onto their property, one must ask for what reason do Petitioners pay taxes?[2] Moreover, "Article VI, §13 of the South Dakota Constitution' 'vests in an owner of property the right to prevent the taking or damaging of property *until* compensation is paid.'" *Benson*, Civ. 03-121 (6th Jud. Cir. Dec. 17, 2004). App. at 99 (emphasis added).

IV. MERE DECRIMINALIZATION, AS ARGUED BY SOUTH DAKOTA, DOES NOT PRECLUDE A TAKING REQUIRING JUST COMPENSATION.

Even if, contrary to the facts of this case, this Court were to take South Dakota at its "post-litigation" word that the legislature's action merely decriminalized the shooting onto private property, when this state action results in a physical occupation (even by a third party) a taking has occurred. For, even if, as argued by South

[2] "[W]hat is worrisome about the [South Dakota Supreme] Court's decision . . . is its rationale. It reasons that private property can be opened to public use through the expedient of 'decriminalizing' the very laws that protect private property. This ignores an essential function of our constitutional form of government." "A Government is instituted to protect property of every sort . . . This being the end of government, that alone is a just government, which impartially secures to every man that which is his own." *Benson v. State of South Dakota*, 710 N.W. 2d 131 (S.D. 2006) (Justice Kokencamp concurring) (citing James Madison). App. at 58.

Dakota, Petitioners have no "right to demand criminal prohibition and prosecution" of dangerous trespass actions by hunters, it does not necessarily follow that this lack of a right to demand criminality precludes Petitioners' right to demand just compensation when that "decriminalization," combined with acts of encouragement by arms of the State apparatus, results in shot traversing Petitioners' private property.

In fact, if one takes South Dakota at its word that the legislature was merely decriminalizing the trespass, the legislature itself, by including a provision to nullify the entire statute if a taking were found, must have well understood that this "decriminalization" may indeed result in and not be mutually exclusive of an unconstitutional taking.

Moreover, the statute's nullification provision makes eminently more sense when read in the context consistent with the initial legislative, administrative, and executive branch interpretation of the statute; that is, the law caused an alteration of South Dakota's comprehensive regulatory hunting scheme to make fully lawful the shooting onto private property from public rights-of-way.

CONCLUSION

This Court should grant *certiorari* and remand this case to the South Dakota Supreme Court with instructions to apply correctly this Court's physical-invasion takings precedents, after which the South Dakota Supreme Court must nullify the statute in question subject to its own nullification provision.

Respectfully submitted,

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